UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES ATLANTA BRANCH OFFICE

SAN JUAN BAUTISTA, INC. d/b/a SAN JUAN BAUTISTA MEDICAL CENTER

and

CASE 24-CA-11419

HERMANDAD DE EMPLEADOS DE LA SALUD Y OTRAS AGENCIAS

Ayehsa K. Villegas Estrada, Esq., for the Government.¹
Eliseo Roques Arroyo, Esq., Luis R.
Perez Giusti, Esq., and, Mariel
Ayala Morales, Esq., for the
Hospital.²

DECISION

Statement of the Case

William N. Cates, Administrative Law Judge. This is an alleged failure by San Juan Bautista, Inc. d/b/a San Juan Bautista Medical Center (Hospital) to pay employees in certain bargaining units their 2009 Christmas bonus. I heard this case in San Juan, Puerto Rico, on May 18, 2010. The case originates from a charge filed by Hermandad de Empleados de la Salud y Otras Agencias (Union) on December 16, 2009 and amended on March 10, 2010, against the Hospital. The prosecution of the case was formalized on March 31, 2010, when the Regional Director for Region 24 of the National Labor Relations Board (Board), acting in the name of the Board's General Counsel, issued an Order Further Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing (complaint) against the Hospital.

I shall refer to Counsel for General Counsel as Counsel for the Government and General Counsel as the Government.

I shall refer to Counsel for the Respondent as Counsel for the Hospital and shall refer to the Respondent as the Hospital.

The consolidated amended complaint related to five cases. Prior to trial, the Hospital and Union reached a settlement of Cases 24-CA-11096 and 24-CA-11119 which settlement was approved by the Regional Director for Region 24. At the trial, the Hospital and Union reached a settlement of Cases 24-CA-11243 and 24-CA-11416, which I approved on the record at the beginning of the trial, and I remanded those cases to the Regional Director for compliance. The Regional Director, on May 28, 2010, issued an Order reflecting the foregoing, severing those cases, and withdrawing the complaint as to those cases. I have amended the caption herein to delete the case numbers of those cases. The remaining case, 24-CA-11419, was litigated.

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The complaint alleges the Hospital, on or about December 15, 2009, failed and/or refused to pay unit employees' their 2009 Christmas bonus without prior notice to the Union and without affording the Union an opportunity to bargain with the Hospital with respect to this conduct and the effects of this conduct and/or without first bargaining with the Union to a good faith impasse. It is alleged the Christmas bonus is a mandatory subject for the purpose of collective bargaining and that the Hospital has by its actions failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (Act).

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The Hospital, in a timely filed answer to the complaint, denied having violated the Act in any manner alleged in the complaint, and raised certain affirmative defenses.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. The parties stipulated to the facts and called no witnesses. I have studied the whole record, the post-trial briefs, and the authorities cited therein. Based on the analysis below, I conclude and find the Hospital violated the Act substantially as alleged in the complaint.

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Findings of Fact

I. Jurisdiction, Labor Organization Status and Official Positions

The Hospital is a Commonwealth of Puerto Rico corporation with an office and place of business in Caguas, Puerto Rico, where it is, and has been, engaged in the operation of an acute health care facility. During the past 12 months ending March 31, 2010, a representative period, the Hospital purchased and received directly from points and places located outside the Commonwealth of Puerto Rico goods and materials valued in excess of \$50,000. During the same period of time it also had gross revenues in excess of \$250,000. The parties admit, and I find, the Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The parties admit, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

Hospital Human Resources Director Calvin Tua Algarin and Hospital Director Julio Andino Rodriguez are supervisors and agents of the Hospital within the meaning of Section 2(11) and (13) of the Act and Hospital School of Medicine President Yocasta Brugal is an agent of the Hospital within the meaning of Section 2(13) of the Act. Sixto Alvelo is the Union's Executive Director and Maria Diaz Bigio is its President. Miguel Romero is Secretary of the Commonwealth of Puerto Rico Department of Labor and Human Resources; and, Carlos Maldonado Lopez is Deputy Director for the Work Norms Bureau of the Commonwealth of Puerto Rico Department of Labor.

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II. The Facts

A. Background

Before getting to the Christmas bonus at issue herein, it is helpful to review certain background information that places the bonus issue in context.³ It is admitted that the units (Units), described below, constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. It is admitted the Union was certified as the exclusive collective-bargaining representative of the Units on December 17, 2008. It is also admitted that at all times since December 17, 2008, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Units.

B. The Collective-Bargaining Units

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INCLUDED: All licensed registered nurses and technologists employed by the Employer at its hospital located at Caguas, Puerto Rico.

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EXCLUDED: All other employees, including supervisors and guards as defined in the Act.

INCLUDED: All business office clerical employees employed by the Employer at its hospital located in Caguas, Puerto Rico.

The Hospital filed a Motion for Partial Summary Judgment with the Board asking the Board to defer the complaint allegations concerning the 2009 Christmas bonus issues to arbitration. The Board in an Order dated May 17, 2010 declined to do so. The Board concluded the Hospital failed to establish there were no material issues of fact and that it was entitled to partial summary judgment as a matter of law. The Board explained it was further declining to defer because of numerous other complaint allegations including several alleged unilateral changes by the Hospital. The Board's denial was without prejudice to the Hospital renewing its deferral argument before the judge in the event the remaining complaint allegations were resolved prior to trial. Member Schaumber, however, dissented from the majority and would defer the 2009 Christmas bonus dispute to arbitration pursuant to the principles set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971). Member Schaumber views the dispute as arising from differing interpretations of Article 26 of the parties' collective-bargaining agreement and as such covered by the arbitration.

	EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.				
5	INCLUDED: All licensed practical nurses and technician employees employed by the Employer at its hospital located in Caguas, Puerto Rico.				
10	EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.				
	INCLUDED: All maintenance and non-skilled employees employed by the Employer at its facility located in Caguas, Puerto Rico.				
15	EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.				
	C. The 2009 Christmas Bonus				
20	It is stipulated that the Hospital and Union are parties to a collective bargaining agreement effective from June 19, 2009 through June 19, 2012 covering terms and conditions of employment for employees in the Units. Pertinent to this case the parties collective-bargaining agreement at Article 26, "Christmas Bonus" states:				
25	Section 1- The Hospital recognizes the payment of a Christmas Bonus to each union member of the appropriate units, according to the established dispositions of Law 148, of June 30, 1969, as amended, during the first year of the Collective Bargaining Agreement.				
30	Section 2- The Union will present the Hospital with a Christmas Bonus proposal to be negotiated for the second and third year of this Collective Bargaining Agreement.				
35	On October 30, 2009, Union Executive Director Sixto Alvelo notified the				

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negotiations.

On November 10, 2009 Union Executive Director Sixto Alvelo and Union President Diaz Bigio hand delivered a letter to Puerto Rico Secretary of Labor Miguel Romero. In their letter they explain they have information the Hospital has solicited to be exempted from paying the 2009 Christmas bonus to its employees. The Union states in the letter that it represents the Hospital employees and they have a collective bargaining agreement with the Hospital covering the employees. The Union asks that the Hospital's

Hospital in writing of certain actions the Union would be taking including a 24-hour strike commencing at 6 a.m. on December 16, 2009. It was explained that the justification for the various actions was the Hospital's unfair labor practices and bad faith

exemption request be denied and suggests that any controversy regarding the 2009 Christmas bonus be resolved by the parties.

On December 4, 2009 Commonwealth Deputy Director for the Work Norms Bureau of the Puerto Rico Department of Labor Maldonado Lopez wrote the Hospital regarding their request for an exemption from paying the 2009 Christmas bonus. He advised the Hospital that an audit of their finances would be made to determine if the requested exoneration of payment could be granted. He also noted that Puerto Rico's Christmas Bonus Law would "not apply in cases where the employees receive a Christmas bonus by means of a Collective Bargaining Agreement," and that any exemption would "apply to those employees not covered by the Collective Bargaining Agreement."

On December 11, 2009 Deputy Director Maldonado Lopez wrote Union Executive Director Sixto Alvelo acknowledging the Union's representative status of certain of the Hospital's employees and indicated that the exoneration granted to the Hospital regarding the 2009 Christmas bonus would only apply to those employees that are not part of the Units. He also stated the Hospital had been so notified.

Hospital Director Andino Rodriguez attached a memorandum to the pay stubs of all unit employees on December 15, 2009 in which he noted the Union had called a strike for December 16, 2009. He urged the employees not to participate in the "illegal" strike which he said the Union called "due to Hospital Management's determination not to grant the [2009] Christmas Bonus." He suggested that if the employees felt the Hospital was not complying with its contractual requirements to file grievances as outlined in the parties' collective bargaining agreement. Director Andino Rodriguez noted the Hospital had proposed to pay the bonus over time starting in December 2009 and concluding in July 2010, but, indicated the Union rejected that offer.

In order to avoid a work stoppage the parties met on several occasions, bargained and exchanged proposals for payment of the employees' Christmas bonus but never reached an agreement.

On December 21, 2009 Union Executive Director Sixto Alvelo wrote Hospital HR Director Tua Algarin requesting he summon the Grievance Arbitration Committee to resolve the Hospital's failure to pay the 2009 Christmas bonus and noted the Hospital's denial of the bonus "constitutes a violation of Article 26, of the Collective Bargaining Agreement." In a follow up letter of January 5, 2010 Sixto Alvelo asked Tua Algarin to confirm in writing, in accordance with "Section 7-Third Step of Article 10, Grievances and Arbitration Procedures" of the parties collective bargaining agreement, that the Hospital was not going to pay the Christmas bonus.

The parties stipulated the Hospital never at any time paid the 2009 Christmas bonus.

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It is helpful at this point, to examine the Christmas Bonus Law which requires any employer who employs one or more worker or employee to pay the worker or employee a Christmas bonus. The Christmas Bonus Law sets forth the hours (700) an employee must work in a natural year (October 1 to September 30) to be eligible for a bonus and provides computations utilizing employees' wages or salary, up to a fixed maximum, to determine the amount of the bonus. The time frame (December 1 to 15) for paying the bonus is set forth, as well as, penalties for late or nonpayment of the Christmas bonus.

The Puerto Rico Secretary of Labor and Human Resources is designated to administer the Christmas Bonus Law and is empowered to examine an employer's books, accounts, files, and related documents to determine an employer's responsibilities toward their employees regarding Christmas bonuses. An employer may be exempt from paying, in whole or in part, the statutory Christmas bonus by petitioning the Secretary for such relief. An employer may be exempt, in whole or in part, by demonstrating to the Secretary the employer has not obtained profits from its business or the profits are not sufficient to cover the total amount of the bonuses without exceeding a 15-percent limit on net annual profits that must be utilized for the statutory Christmas bonuses. In order to seek any type of exemption an employer must submit by November 30 a general balance sheet and a profit-and-loss statement to the Secretary for the 12-month period from October 1 of the previous year to September 30 of the current year. The balance sheet and profit-and-loss statements must be certified by a certified public accountant. If an employer does not submit the above described general balance sheet and profit-andloss statements within the time and in the manner specified, the employer is required to pay the statutory Christmas bonuses.

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The Christmas Bonus Law states: "The provisions of this chapter shall not apply in cases where the workers or employees receive an annual bonus by collective agreement; except in the event where the amount of the bonus to which entitled by such agreement may result lower than the one provided by this chapter in which case they shall receive the necessary amounts to complete the bonus provided herein."

III. Analysis, Discussion, and Conclusions

The complaint alleges that the Hospital violated the Act by failing to pay the Christmas bonus without prior notice to the Union and without affording the Union an opportunity to bargain.

The General Counsel argues that the failure to pay the Christmas bonus constituted a unilateral change in the contract to which the Union did not agree and that deferral to the contractual grievance arbitration procedure is inappropriate.

The Hospital, at the hearing and in its brief, argues that deferral to arbitration is appropriate because its failure to pay the Christmas bonus relates to "interpretations or application of the agreement." I disagree. Deferral to arbitration is appropriate when the issue relates to the meaning of contractual provisions. As explained in *Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 408 (9th Cir. 1978), it would "undercut the duty to bargain if

the employer were allowed to act with reference to a mandatory bargaining subject and then simply defend its actions in a later arbitration hearing." The contractual language regarding the obligation of the Hospital during the first year of the contract to pay the Christmas bonus consistent with the Puerto Rico statute is clear and unambiguous:

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The Hospital recognizes the payment of a Christmas Bonus to each union member of the appropriate units, according to the established dispositions of Law 148, of June 30, 1969, as amended, during the first year of the Collective Bargaining Agreement.

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When the meaning of a contract provision is free from ambiguity, arbitration is unnecessary and deferral is inappropriate. *Caritas Good Samaritan Medical Center*, 340 NLRB 61, 63 (2003).

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The Hospital, in its brief, argues that it was not obligated to pay the bonus because it sought and was granted an exemption. In that regard, the Hospital contends that the contractual language "incorporated the economic waiver provision." The brief neglects to acknowledge that the exemption was not granted with regard to employees in the bargaining units whose terms and conditions of employment, including specifically payment of the Christmas bonus, were addressed in the collective bargaining agreement. The December 4, 2009, letter to the Hospital from Maldonado Lopez points out that Puerto Rico's Christmas Bonus Law does "not apply in cases where the employees receive a Christmas bonus by means of a Collective Bargaining Agreement" and that any exemption granted would apply only "to those employees not covered by the Collective Bargaining Agreement." Thus, the exemption did not apply to employees who were covered by the collective bargaining agreement. As correctly argued in the brief of the General Counsel, upon the receipt of the December 4 letter the Hospital had two choices: "(1) obtain the consent of the Union to pay a different amount for the Christmas bonus; or (2) pay the Christmas bonus."

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The Christmas bonus, monetary compensation comparable to wages, was a term and condition of employment of the employees in the Units and was a mandatory subject of bargaining. "[I]t is well settled that an employer violates Section 8(a)(5) and (1) of the Act as elucidated in Section 8(d) of the Act, by modifying a term of a collective bargaining agreement without the consent of the other party while the contract is in effect [footnote omitted]." Bonnell/Tredegar Industries, 313 NLRB 789, 790 (1994). An employer is prohibited from modifying the terms and conditions of employment established by a collective-bargaining agreement without first obtaining the consent of the union.

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I find the Hospital violated Section 8(a)(5) and (1) of the Act when it modified the Christmas bonus provisions of the parties' collective-bargaining agreement by failing to pay the Christmas bonus provided therein without the consent of the Union.

REMEDY

Having found that the Hospital has engaged in certain unfair labor practices, I find it necessary to order the Hospital to cease and desist there from and to take certain affirmative action designed to effectuate the polices of the Act as set forth in the recommended Order below.

The Hospital, having unlawfully failed to pay employees in the Units the Christmas bonus, it must make them whole by paying the bonus plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The General Counsel requests that compound interest be awarded upon any backpay due. Consistent with the decision of the Board in *Carpenters Local 687 (Convention & Show Services)*, 352 NLRB 1016, fn. 2 (2008), not to deviate from its current practice of awarding simple interest, I deny that request.

The Respondent will also be ordered to post an appropriate notice in both English and Spanish.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:⁴

ORDER

25 The Hospital, San Juan Bautista, Inc. d/b/a San Juan Bautista Medical Center, its officers, agents, and successors, and assigns, shall

1. Cease and desist from:

30 (a) Failing to bargain in good faith with Hermandad de Empleados de la Salud y Otras Agencias as the exclusive collective-bargaining representative in the following units:

INCLUDED: All licensed registered nurses and technologists employed by the Employer at its hospital located at Caguas, Puerto Rico.

EXCLUDED: All other employees, including supervisors and guards as defined in the Act.

INCLUDED: All business office clerical employees employed by the Employer at its hospital located in Caguas, Puerto Rico.

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If no exceptions are filed as provided by Sec. 102.46 of the Board's rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.

INCLUDED: All licensed practical nurses and technician employees employed by the Employer at its hospital located in Caguas, Puerto Rico.

EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.

INCLUDED: All maintenance and non-skilled employees employed by the Employer at its facility located in Caguas, Puerto Rico.

EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.

- (b) Failing to continue in effect all the terms and conditions of employment contained in the collective-bargaining agreement covering its employees in the units described above, and failing and refusing to pay those unit employees their 2009 Christmas bonus as set forth in the collective-bargaining agreement covering the unit employees.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

- (a) Continue in effect all the terms and conditions of employment contained in the collective-bargaining agreement covering its employees in the units described above and pay each unit employee their 2009 Christmas bonus, with interest as prescribed in *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987).
- (b) Preserve and, within 14 days of a request, or such additional time as the Regional Director for Region 24 may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic from, necessary to analyze the amount, with interest, of the 2009 Christmas bonus due under the terms of this Order.
 - (c) Within 14 days after service by the Region, post at its facility in Caguas, Puerto Rico, copies of the attached notice marked "Appendix" in both English and Spanish.⁵ Copies of the notice on forms provided by the Regional Director for

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If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted"

Region 24, after being signed by the Hospital's authorized representative, shall be posted by the Hospital and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Hospital to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Hospital has gone out of business or closed the facility involved in these proceedings, the Hospital shall duplicate and mail, at its own expense, a copy of the notice in both English and Spanish to all current employees and former employees employed by the Hospital at any time since December 15, 2009.

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- (d) Within 21 days after service by the Region, file with the Regional Director for Region 24 of the Board a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Hospital has taken to comply
- Dated, Washington, D.C., July 14, 2010.

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William N. Cates Associate Chief Judge

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BORD An Agency of the United States Government

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10	The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice				
10	FEDERAL LAW GIVES YOU THE RIGHT TO Form, join or assist a union Choose representatives to bargain with us on your behalf				
15	Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.				
20	WE WILL NOT fail to bargain in good faith with Hermandad de Empleados de la Salud y Otras Agencias as the exclusive collective-bargaining representative of the employees in the following appropriate units:				
	INCLUDED: All licensed registered nurses and technologists employed by the Employer at its hospital located at Caguas, Puerto Rico.				
25	EXCLUDED: All other employees, including supervisors and guards as defined in the Act.				
	INCLUDED: All business office clerical employees employed by the Employer at its hospital located in Caguas, Puerto Rico.				
30	EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.				
35	INCLUDED: All licensed practical nurses and technician employees employed by the Employer at its hospital located in Caguas, Puerto Rico.				
	EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.				
40	INCLUDED: All maintenance and non-skilled employees employed by the Employer at its facility located in Caguas, Puerto Rico.				
	EXCLUDED: All other employees, including supervisors, guards and professionals as defined in the Act.				

WE WILL NOT fail and refuse to continue in effect all the terms and conditions of employment contained in the collective-bargaining agreement covering employees in the units described above

5 WE WILL NOT fail and refuse to pay the unit employees their 2009 Christmas bonus as set forth in the collective-bargaining agreement.

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL continue in effect all the terms and conditions of employment contained in the collective-bargaining agreement covering our employees in the units described above.

WE WILL pay each unit employee their 2009 Christmas bonus as set forth in the collective bargaining agreement with interest.

	SAN JUAN BAUTISTA, INC. d/b/a SAN JUAN BAUTISTA MEDICAL CENTE		
	_	(Employer)	
Dated	By		
	_	(Representative)	(Title)

- The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
 - 525 F. D. Roosevelt Avenue, La Torre de Plaza, Suite 1002, San Juan, PR 00918-1002 787-766-5347, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM
THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR
COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS
NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE
ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, 787-766-5377.